

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the matter of)	
)	
Amendment of Parts 73 and)	MB Docket No. 08-253
74 of the Commission's Rules to)	
Establish Rules for)	
Replacement Digital Low Power)	
Television Translator Stations)	

PETITION FOR RECONSIDERATION

KMCE, Inc., licensee of low power television broadcast station KMCE-LP, Monterey, CA, by its attorney ("KMCE" or "Petitioner") here petitions for reconsideration of the Report and Order in this matter released on May 8, 2009, FCC 09-36, and of the rules adopted therewith. The Report and Order was published in the Federal Register on May 20, 2009, 74 F. Reg. 23650, and this petition is timely. (References to the Report and Order herein are to paragraphs.)

In this proceeding, the Commission adopted a policy of interim processing, permitting applications to be filed during the pendency of the rule making. A look at the some of the applications filed to date has revealed major flaws in the plan. This petition is intended to afford the Commission an opportunity to correct

those flaws. Concurrently, by separate filing, petitioner seeks a stay of all authorizations based on these interim applications, until the rules can be appropriately modified in the public interest.

A. Petitioner Has Standing.

KMCE-LP is the Azteca America Network affiliate in the Monterey-Salinas-Santa Cruz, California DMA. KMCE provides exclusively Spanish language programming on both a national and local basis to this top-30 Hispanic market. Petitioner supports the DTV transition and is familiar with its many benefits of enhanced services. In particular we look forward to providing eventually a full digital channel where various language groups could be served thorough the capacity for multiple program streams.

There has been no generalized filing opportunity for LPTV and TV translators for approximately seven years. When a window opened for a digital companion channel, KMCE applied for one. But the same channel was applied for by two other parties, and the Commission made no provision for removing conflicts through channel changes. The result was an auction in which KMCE chose not to participate, given the cost and complexity of monitoring an intricate multi-round auction proceeding in the pursuit of only one channel. That has left KMCE with but two paths for the DTV upgrade, either by waiting until the freeze on new TV translator and LPTV station filings is lifted, or by applying for a “flash cut” to a digital service on its existing Channel 43.

In adopting these rules the Commission appeared to believe that the preclusionary effect of these facilities would be minor: “[i]t is not likely that replacement translators will have a substantial impact on other uses of this spectrum.” para. 7. Nothing could be further from the truth. Each such facility uses an *additional channel*, even possibly the channel the full service station had been required to give up. Rarely, if ever, does such an application show greater sq. km. coverage to the supposedly deprived service area than to other areas where the broadcaster receives the bounty of a free second channel. In and around any sizable market area such as ours, this replacement service is all but certain to preempt the best and last channels.

We have come slowly to recognize an even more serious problem, the deterrent effect of according these applications a spectrum priority. A replacement channel is given priority here over new applications for TV translators and LPTV, except in relation to displacement applications, where the priority is co-equal. A late filed “replacement” can override and displace an application of lower priority. This means that during any future filing opportunity, even if new applications are cut off against competitors, any nearby full service TV station will be free to file a “replacement” on top of any proposal, picking off a competitor at will and destroying its digital upgrade path.

For KMCE the flash cut alternative would be superficially attractive, but in practice it is not. Our Hispanic viewers predominately receive our content over-

the-air on small television sets with “rod antennas,” and their rate of subscribing to cable and satellite services is about on-half the level of other population groups. KMCE enjoys the benefit of cable and satellite carriage but the majority of our viewers do not subscribe to alternative delivery services. At this time a flash cut to digital would destroy our core viewership. Moreover, the flexibility to design a flash cut, expanding service as permitted in any direction, could be foreclosed where a full service station can make a peremptory filing to thwart the enhanced service area.

B. Filings to Date Foretell Egregious Abuses of the Privilege Here Accorded Full Service TV Stations.

The Commission has not taken the opportunity to conduct any examination of the applications to date. The notice states that, “We have not received a replacement translator application seeking to expand a full-service station’s post-transition digital service area beyond its analog contour,” para. 22. The statement is simply wrong.¹ Any review of the applications to date will show that the full service stations have adopted an exceedingly liberal and self-serving interpretation of the term, *de minimis*, para. 22.

The service is supposed to be limited to analog service loss areas, NPRM, 23 FCC Rcd at 18536, para. 7, the Report and Order here at 18-20, and new

¹ See BDRTCT-20090217AFX; BDRTCT-20090401APJ; BDRTCT20090403ACA. Maps exemplifying this trend, for KIRO and WFTV, are appended hereto.

Section 74.787(a)(5)(i) -- applicant must “demonstrate” that the proposal will provide service to the area where service has been lost. However many applicants have not even bothered to make any demonstration of this factor, but nonetheless have been routinely accepted for filing.²

Or consider WPXI, for example. The station on June 10 applied for three “replacement” channels, using Channel 21, Channel 23, and Channel 33. It would appear that the “replacement” square mile area in their plan is about five per-cent of their proposed overall spectrum haul, precluding these channels for other uses and services.

Consider again, the application of KPCQ, map shown below. By utilizing an unorthodox and off-brand coverage methodology, the applicant came up with a huge, but largely fictitious loss area composed of more than half the analog service area. Then it proposed “replacement” coverage to half a million people in the Seattle metro. Assuming that everything in this work of creative writing were true, there is no justification for giving an incumbent broadcaster an additional, free channel in a Top 20 market to the exclusion of other applicants.

Finally the application of KTVU, 20090509AKX referenced in fn. 2, while making no attempt to explain the nature of the lost coverage being replaced, knowingly and deliberately targeted the application for digital service by a neighboring LPTV station.³

² See BDRTCT-20090509AKX; BDRTCT-20090427ACQ

These full service TV applicants could have been expected to show a least minimal discretion while the rule making was pending. Now with final rules in place, one can only imagine how far they might go in harvesting more spectrum by this route.

C. Recommendations on Reconsideration.

For these reasons Petitioner urges that the Commission reconsider its rules in this new replacement service, and take the following steps:

1. The Commission should stay the grant of any of the pending authorizations, and roll this service into a generalized LPTV and TV translator filing opportunity, with no preference for incumbent full service TV broadcasters.

This proceeding overall was a somewhat hasty action to ameliorate a perceived problems in the DTV transition. However, the June 12 transition date has come and gone. There is no DTV transitional reason to rush into irreversible steps. Indeed, in this proceeding (paras. 30-33) MSTV, NAB and APTS argued against a six-month construction period and pleaded for a full three years, clearly indicating that they will be in no rush to build these facilities, once the new, free spectrum is locked down for them.

Before issuance any authorizations, the Commission should revisit, and rescind its preference for full service TV applicants, and permit LPTV stations

³ Petition to Deny by Broadland Propoerites LLC, submitted on June 8, 2009.

and TV translators to likewise apply. The necessity of competitive bidding to resolve conflicts will operate as a check on urban filings. After a brief opportunity for channel changes and settlements, conflicting groups can be referred to an auction and winners may be quickly determined. It is likely that an auction winner, having made an investment in its frequency, will build far more rapidly than a full service TV speculator holding cost-free spectrum rights for three years.

2. Alternatively, if the Commission unwisely decides to stick with a priority for full service TV so-called “replacement” service, the filings to date show that key safeguards must be added.

(a) In that case the Commission should adopt a service rule, restricting the use of these facilities to exact replication of the primary station’s program services. To deter the spectrum grab that appears to be underway the Commission needs to make it clear that these facilities not only are TV translators only, but that they are not authorized to provide any content whatsoever -- on any part of their channel -- for material other than the simultaneous rebroadcast of the primary station.

(b) Stations should not be permitted to apply for these facilities to replace coverage, unless they have built out maximum facilities on their primary channel.

The Commission touchingly states that, “[W]e do encourage stations to consider other, potentially more spectrally efficient solutions such as maximization and

DTS.” para. 7. If we have learned anything from the decision to repose full responsibility for the DTV build-out exclusively in the hands of the incumbent full service broadcasters, it is that such entreaties to nobility are of little effect. Only applicants who have maximized on their main channel -- the obvious and most efficient approach -- should ever be considered for this service.

(c) The Commission should sunset this filing opportunity at an early date.

On the yet unproved assumption that this service is genuinely needed, full service stations will have all the operational data they need about impaired coverage during the initial few months of the post-transition era. Th Commission should terminate this filing opportunity within eighteen months. Stations were authorized to start filing for these facilities on January 5, 2009, Public Notice DA 08-2818, rel. December 30, 2008. So this would permit a full two years for any genuinely needed services to be applied for. A sunset will curtail the ability of any full service station to make anti-competitive filings against others in or near their service areas (fn. 3 *supra*).

(d) The Commission should create an opportunity for TV translators and LPTV stations to participate fully in the development of DTV. In several passages of the Report and Order, the Commission claims that full service TV stations need a special priority, because of its expedited role in the transition:

Low Power television and TV translator stations are not currently required to convert to digital broadcast by a congressionally mandated date and therefore do not require the expedited processing needed for replacement translators.

Para. 12. Yet it was by the Commission's choice that translators and LPTV were placed on a slower track. That choice was an unfortunate one, and it should not be expanded to justify further discrepancies. A new filing opportunity and channel-change flexibility are desperately needed, to bring these services up to speed with the rest of the DTV transition. We submit that, in the catalog of obstacles to full DTV implementation, the low power transition, potentially involving⁴ some 2,298 LPTV stations (excluding Class A) and 4,989 TV translators throughout the United States looms much larger than signal delivery losses alleged but not shown at the margin of full service TV.

D. Conclusion

This new service was intended to address a problem that has not been shown to exist, while not addressing serious problems that continue to fester. The assumption that full service TV stations have a known, reduced area of coverage that can be depicted by a difference in coverage contours is just that -- a bald, unsupported and unproved assumption.

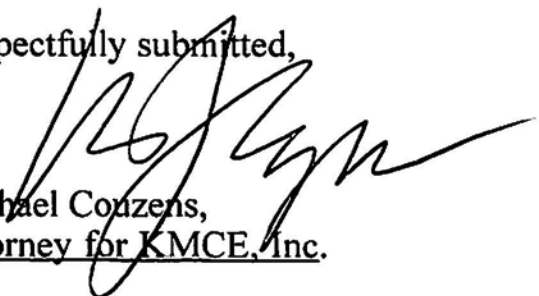
DTV consumer problems -- including antenna selection and rotation, channel scanning, availability of decoders, and local terrain obstructions -- are larger and far more serious issues than the transmission problems. On the transmission side, the viability of secondary services such as TV translators and

⁴ Broadcast Stations Totals as of 12/21/2008, rel. February 27, 2009.

LPTV stations, and even their Class A kindred, will have more impact on the future viability of over-the-air broadcasting in the United States than the replacements offered in proceeding.

For these reasons it is requested that the Commission reconsider the report and order herein, and upon reconsideration make the changes urged here.

Respectfully submitted,



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